

NO. 21650 ✓

**United States
Court of Appeals**
for the Ninth Circuit

GEORGE WASHINGTON DURHAM,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

*On Appeal from the United States District Court
for the District of Oregon*

BRIEF OF APPELLEE

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FILED

JUL 25 1967

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BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT

The jurisdiction of the United States District Court for the District of Oregon was based on 18 U.S.C. 3231. This Court has jurisdiction by virtue of 28 U.S.C. 1291. The indictment charges offenses against the laws of the United States.

STATUTES INVOLVED

18 U.S.C. Sec. 474. Plates or stones for counterfeiting obligations or securities.

“Whoever has in his control, custody, or possession any plate, stone, or other thing in any manner made after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof; or

“Whoever has in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; . . .

“Shall be fined not more than \$5,000 or imprisoned not more than fifteen years, or both.”

COUNTER STATEMENT OF THE CASE

On July 12, 1965, Frank Kenney, Special Agent in Charge of the Secret Service, Portland, received a telephone call from the manager of the Metropolitan Branch of the U.S. National Bank of Portland (Tr. 118).¹ The manager reported receipt by the bank in its deposits from an Oregon State liquor store of a possible counterfeit \$20 Federal Reserve note (Tr. 119, 124). Kenney went immediately to the bank and determined that the note was counterfeit and called to the attention of the bank's manager a series of numbers written in ink upon the counterfeit note (Tr. 120, 125). Kenney believed that these might be an automobile license number. He immediately inquired of the Oregon State Department of Motor Vehicles and determined that the numbers written upon the Note, 8M5106, were the license number for a 1955 Dodge sedan registered in the name of the defendant at Box 214, Clackamas, Oregon (Tr. 12, Ex. 11).

This counterfeit note was the first of its type received by the Treasury and was assigned a circular identification number "2501" (Tr. 119, 158, 188). It was printed upon Anniversary bond paper (Tr. 198). This particular note and similar ones

¹As used hereafter R. denotes the record on appeal, Tr. the transcript of proceedings, App. the Appendix of this Brief, and Def. Ex. Defendant's Exhibits at Pre Trial Hearings.

received thereafter were produced by a photo engraving process (Tr. 120, 189). This consists of photographing a genuine note, burning the impression of the photographic negative onto a presensitized aluminum plate by means of a chemical process, printing from the plate onto a rubber blanket and transferring the impression on the blanket onto paper (Tr. 189). The serial number of this note was affixed by a separate printing process (Tr. 189, 192).

On July 19, 1965, Durham was in San Francisco, California. He had taken a "little trip" from Clackamas, Oregon where he then resided (Tr. 132, 138, 221, Ex. 12). Prior to leaving Oregon, his friend, Archie Leo (Tom) Mishler, had asked Durham to buy some good strong paper in San Francisco (Tr. 221). Mishler's address was Route 1, Box 483, Clackamas, Oregon. Mishler gave Durham \$50 to \$60 for this purpose (Tr. 236).

Durham telephoned the Commercial Paper Company, 300 Brannan, San Francisco, during the morning of July 19, 1965 (Tr. 130, 235). He asked for Anniversary Bond Paper (Tr. 130, 235). He was told that the company carried a comparable sheet called Agawam Bond (Tr. 130). Durham went to the Commercial Paper Company and asked for 100 per cent rag paper (Tr. 130). He ordered ". . . as much as \$40 will buy" (Tr. 130). Mr. Synsynuk

wrote up the order for six reams (3,000 sheets, 8 1-2 x 11) of Agawam Bond and received a \$50 bill in payment from Durham (Tr. 130).

Two weeks before Durham's appearance in San Francisco a Secret Service Agent had requested personnel of the Commercial Paper Company to obtain the names of everyone buying 100 per cent rag bond whom they did not know (Tr. 134). In the course of writing up Durham's order, Synsynuk excused himself and discussed the sale with his superior, Mr. Hayes (Tr. 131). Hayes became suspicious and directed Synsynuk to require Durham to give an identification (Tr. 132, 138). Hayes then talked to Durham and learned that Durham wanted the paper for a friend in Clackamas, Oregon, who made auto glass prints and was going to use the paper for a technical manual (Tr. 139). Mr. Synsynuk had never heard of anyone putting 100 per cent rag paper in a book (Tr. 135). Hayes reported the incident to the Secret Service in San Francisco who passed the information to Special Agent Kenney in Portland (Tr. 5, 6).

Prior to leaving for San Francisco, Durham knew that Mishler had been convicted of counterfeiting, that Mishler had a shop at the rear of his residence in Clackamas containing all kinds of printing equipment which was used in connection with his business of printing patterns for auto glass (Tr. 237,

238). Upon his return from San Francisco, Durham delivered the six reams of Agawam Bond to Mishler (Tr. 236). This type of paper is readily available in Portland (Tr. 140).

During December 1965, Durham purchased a trailer from John F. Goodwin of Milwaukie, Oregon (Tr. 141), and during February of 1966, Durham went to work as a farm hand at the Orville Killingbeck chicken farm at 7911 S.E. Thiessen Road, Milwaukie, Clackamas County, Oregon (Tr. 143, 144). Durham has taught art classes and done photographic work, being a portrait painter and artist (Tr. 217, 224). He moved his trailer onto the farm and lived alone in the trailer with his dog until the time of his arrest on Thursday, May 5, 1966 (Tr. 145).

As previously mentioned, Special Agent Kenney obtained the first counterfeit \$20 Federal Reserve Note of the "2501" type on July 12, 1965. Thereafter, he received an average of around \$200 worth of these notes a month until the date of defendant's arrest on May 5, 1966. Thereafter the number of such notes received diminished (Tr. 119, 121).

During the week immediately preceding May 5, 1966, Special Agent Kenney was informed by a confidential informant that during 1964 and 1965 Durham and Mishler had printed up some \$20 counterfeit notes (Tr. 11). Durham had been previously sen-

tenced to life imprisonment as a habitual criminal in the Circuit Court of the State of Oregon for Marion County (Ex. 32).

On May 5, 1966, Special Agent Kenney made his affidavit for a search warrant (Def. Ex. 4) before United States Commissioner Louis Stern. Commissioner Stern issued the warrant (Def. Ex. 5) for search of Durham's trailer at the Killingbeck farm, for search of Durham's 1955 Dodge and Durham's person.

Shortly after noon on May 5, 1966, Special Agent Newbrand, together with other agents of the Secret Service went to the Killingbeck farm and learned from Mrs. Killingbeck that her husband and Durham were away on a fishing trip and not expected back until late that day. The Agents kept the farm under surveillance for a portion of that afternoon (Tr. 15-30, 40-42, 180-182).

Durham and Killingbeck returned from their fishing trip between 2:00 and 3:00 p.m. on the afternoon of May 5 (Tr. 210, 227). After unloading his fishing gear, Durham went to a doctor's clinic approximately a mile away for treatment of his thumb (Tr. 228). He waited there about an hour and a half, then went to the Clackamas Post Office and then to dinner at the home of Mrs. Yackley, Tom Mishler's daughter (Tr. 233). Durham then

returned to the Killingbeck farm and discussed farm chores with Mr. Killingbeck at the barn when Secret Service Agents arrived (Tr. 228).

About 7:15 p.m. on May 5, 1966, Special Agents Newbrand, Prouty, and Endicott returned to the farm. Agent Newbrand got out of the car, approached Durham and identified himself as a Special Agent of the United States Secret Service (Tr. 16). Durham responded by saying "Well, that's fine," and then remarked that he was busy and had a chore to do (Tr. 17, 180-183). Newbrand accompanied Durham into the dimly lighted barn and both stepped onto a dumbwaiter type elevator located in the corner of the barn. Durham almost immediately announced that he could put off his chores (Tr. 42). Agent Newbrand further explained the the reason for his visit to the farm and announced that he had a search warrant for Durham's trailer, automobile and person (Tr. 84). Newbrand warned him of his rights (Tr. 84). Durham then asked Newbrand, "What if I could guarantee to you—I could guarantee to you that counterfeiting in the Portland area would stop?" Newbrand responded that he could make no promises (Tr. 85). Newbrand asked if Durham's trailer was open. Durham stated it was locked and led Newbrand to the Killingbeck farm house where Durham obtained a key hanging on an inside wall. Durham opened the trailer and

then stated, "I am not responsible for anything you find in there." Search of the trailer was then begun by Agents Prouty and Endicott. Agent Newbrand searched Durham and his 1955 Dodge. Durham had no wallet on his person and upon inquiry responded, "I don't have one." (Tr. 87). Agent Prouty almost immediately found a one gallon jar located under an enclosed seat in the trailer containing \$19,640 in counterfeit \$20 Federal Reserve Notes (Tr. 159) of the "2501" type. This jar also contained an aluminum plate for a counterfeit \$5 United States Treasury Note (Tr. 160).

The search of the trailer continued and uncovered a second gallon jar (Ex. 25) containing a wheel of nine discs with digit numbers set to the numerical position of the serial number printed upon the counterfeit \$20 notes and covered with hemlock green ink (Tr. 192). In addition, this jar contained blue and red sewing threads similar to colored threads used in genuine currency (Tr. 192). Other items found were a rubber blanket (Ex. 19), photo off-set plates (Ex. 31), red opaque (Ex. 18), a chromium intensifier (Ex. 22) of the type used in treatment of an off-set plate, a Seneca camera (Ex. 26), a Rochester optic camera (Ex. 15), arc lights (Ex. 20), a can of hemlock green ink (Ex. 16), coffee jars containing coffee grounds and some liquid capable of being used as an aging agent for new

currency (Ex. 16, Tr. 190), and other paraphernalia capable of being used in the counterfeiting process.

After discovery of the counterfeit currency and plate in Durham's trailer, Durham was placed under arrest (Tr. 184).

On Friday, May 6, 1966, Special Agent Kenney went to Tom Mishler's house in Clackamas, Oregon and with Mishler's consent conducted a search for further evidence (Tr. 171). While there, Mrs. Yackley, Mishler's daughter, volunteered that on the prior evening, Durham had been at her house and displayed a wallet containing currency (Tr. 170).

On Saturday, May 7, 1966, Special Agent Kenney instructed Agent Newbrand to return to the Orville Killingbeck farm. Agents Newbrand and Prouty returned to the Killingbeck farm about 1:00 p.m. that Saturday and Newbrand inquired of Killingbeck if he had found Durham's wallet (Tr. 185). He said that he had. He said that he had found it on the floor of the barn immediately adjacent to the dumb-waiter elevator (Tr. 185) on the morning of Friday, May 6, 1966. Killingbeck had placed the wallet in a drawer in the farm house and produced it and delivered it to Newbrand. The wallet contained two \$20 counterfeit "2501" notes (Exs. 2, 3, Tr. 186-187).

On June 13, 1966, defendant was indicted by a

Federal Grand Jury at Portland, Oregon. The indictment charged defendant in three counts with violations of Title 18 U.S.C. Sec. 474. Count I alleged defendant's unlawful possession of a purported \$20 Federal Reserve Note on or about May 5, 1966 at the Killingbeck farm. The counterfeit notes contained in the gallon jar (Exs. 1 and 5), found by Agent Prouty in Durham's trailer during the search of May 5, 1966, were a principal basis of this charge. Count II alleged defendant's unlawful possession during the period May 1 through May 7, 1966 of an additional purported \$20 Federal Reserve Note. The two counterfeit notes (Exs. 2 and 3), found in defendant's wallet on May 7, 1966 by Agent Newbrand on his return to the Killingbeck farm formed a principal basis of this charge. Count III alleged defendant's unlawful possession of a plate to be used in counterfeiting a \$5 United States Treasury Note. The plate (Ex. 4) found in the gallon Jar (Ex. 5) by Agent Prouty in the course of his search of May 5, 1966 formed a basis of this charge.

Defendant moved to suppress the property seized by the Secret Service Agents in the course of their May 5 search and for suppression of his wallet and its contents obtained by Agent Newbrand from Orville Killingbeck on May 7, 1966. Defendant's motion was heard on June 29, 1966 and continued until July 11, 1966. The Court denied defendant's motion on August

5, 1966 (R. 35). On October 18, 1966, defendant moved for an Order requiring the Government to reveal to defendant the identity of the confidential informant referred to in the Affidavit for Search Warrant (Def. Ex. 4). This motion was heard on October 19, 1966. The Government advised that it did not wish to reveal the name of the informant for fear that physical harm would come to him (Tr. 77, 78). Prior to the commencement of trial on October 20, 1966, the Court interrogated the confidential informant referred to in the search warrant (Tr. 115), and ruled that the Government need not divulge his name for the reason of the danger that might result to him if identified (Tr. 115). (See also sealed exhibit). The Government advised defendant that a Government Agent, Mr. Jack Blue, of the Alcohol and Tobacco Tax Division of the Treasury Department had conducted undercover investigation (Tr. 114). Agent Kenney's report concerning Blue's investigation is set forth at pp. 29, 30 of Appellant's opening brief.

Trial commenced and presentation of evidence was completed by both parties on October 20. The following day the Court dismissed Count III (Tr. 254). The jury found defendant guilty of Counts I and II. Defendant then moved for dismissal as to Count I which was allowed.

On October 26, 1966 Durham was sentenced on Count II to a period of imprisonment of 12 years, with

the provision that he might be eligible for parole at the discretion of the Parole Board.

SUMMARY OF ARGUMENT

I. Defendant's Wallet and Its Contents (Exs. 2, 3, and 6) Were Properly Admitted.

This Court need not consider defendant's claim that his wallet and its contents were in some manner tainted with an alleged illegal search of May 5, 1966. This is because the evidence obtained during the May 5 search did not form the basis of the charge of which defendant was convicted. The evidence from this search did form a principal basis for two charges which were dismissed by the Court. Because of the importance which defendant attaches to this search, the Government will answer his arguments respecting it.

A. The Search of May 5, 1966 was Lawful.

1. The District Court found there was probable cause for issuance of the search warrant. This finding is supported by the facts set forth in the statement of Special Agent Kenney attached to the affidavit for search warrant. These facts show sufficient elements of personal knowledge by Agent Kenney to establish probable cause together with information received from a confidential informant which is confirmed and supported by the facts of Agent Kenney's personal knowledge.

2. The Search Warrant sufficiently describes the property to be seized. Literal identity is not required particularly in the description of counterfeit notes and paraphernalia. The description in the warrant describing the property to be seized as "certain \$20 counterfeit Federal Reserve Notes and other counterfeiting paraphernalia . . ." is well within the description approved by the authorities and found sufficient by the District Court.

3. The property which was seized during the search of May 5, 1966 was adequately described in the search warrant. The District Court so found. Each item seized and offered at trial was capable of use in counterfeiting and constituted either contraband or an instrumentality of the crime. Those items seized, but not offered at trial had similar characteristics and are encompassed within the term "counterfeiting paraphernalia." Even if some items seized do not fall within one of the categories of contraband, instrumentalities or fruit of the crime or "mere evidence", their seizure does not require invalidation of the search and suppression of seized property which is described in the warrant.

4. Defendant received a sufficient receipt for the property seized on May 5, 1966. See Def. Exs. 1 and 2. Even if these receipts are not identical with the return filed (Def. Ex. 5), they are suffi-

cient and if not sufficient, defendant's later receipt of a copy of the return as filed would cure any defect.

5. This Court may wish to consider the search of defendant's person on May 5, 1966 as within the standards recently applied for momentary detention and interrogation by police officers under suspicious circumstances. In this event the items seized were obtained incident to a lawful arrest.

B. Defendant's wallet and its contents were obtained on May 7, 1966 as the result of several independent sources of information, including those set forth in Agent Kenney's statement attached to his affidavit for search warrant and his conversation with Mrs. Yackley on May 6, 1966. Defendant, during the May 5 search, did not provide any direction for further investigation. The later discovery of his wallet on May 7, 1966 was too far removed from the search of May 5. It was not a necessary product of that search.

II. The District Court was Correct in Refusing to Strike Exhibit 8.

Defendant's counsel, by his affirmative representation that he had no objection to this evidence and his continued withholding of objection until shortly before instruction of the jury, waived any claim of

error in admission of this evidence. This evidence was relevant and material.

II. The District Court was Correct in Refusing to Require Disclosure of Identity of the Confidential Informant.

Defendant had a full opportunity to examine Agent Kenney regarding the informant and did not pursue it. Defendant's Motion, on the eve of trial, to require disclosure was an afterthought. It was based on mere statements and was not supported by affidavit, authority or other reasons for such disclosure. Notwithstanding this, the District Court interrogated the informant and concluded that the informant could give no information helpful to defendant and that to reveal his identity might result in danger to him. The facts show that the informant did not help to set up the commission of the crime and was not present at its occurrence. Disclosure of his identity was not required.

IV. The District Court was Correct in Denying Defendant's Motions for Judgment of Acquittal at the Close of the Government's Case, at the Close of all Evidence, and in the Alternative for a New Trial After the Jury's Verdict.

There was substantial evidence to support the

Court's rulings upon defendant's motions and to support the jury's verdict.

ARGUMENT

I

1. The District Court Was Correct in Admitting Defendant's Wallet and its Contents.

This Court need not consider the merit of defendant's claim that the District Court erred in refusing to exclude evidence seized under a search warrant on May 5, 1966 (Assignment of Error No. 1). See *Cotton v. U.S.*, 371 F.2d 385, 391 (C.A. 9, 1967). Defendant was convicted only of the charge set forth in Count II of the Indictment. The substantial evidence supporting this conviction will be discussed in a later section of this brief. The items of real evidence which constitute a principal basis for the charge in Count II are two \$20 counterfeit Federal Reserve Notes found in defendant's wallet on May 7, 1966 and the wallet itself (Exs. 2, 3, and 6). The real evidence obtained during the search of May 5, constitutes a basis for the charges set forth in Counts I and III of the Indictment. Counts I and III were dismissed by the Court (Tr. 282 and 254).

Count I was based in part upon counterfeit \$20 Federal Reserve Notes found in a gallon jar during the course of the May 5 search (Exs. 1 and 5). The Court

dismissed Count I following the jury's verdict of guilty because the back plate number (946) set forth in the Indictment differed from the back plate number. (930) on Exhibit 1 (Tr. 282). Exhibit 5, the gallon jar, contained \$19,640 in counterfeit \$20 Federal Reserve Notes which were identical except that some notes had a back plate number of 946 and others 930.

Count III was based in part upon a counterfeit plate (Ex. 4) for a \$5 United States Treasury Note also found in the same gallon jar (Ex. 5). Count III was dismissed by the Court prior to its instruction of the jury because, in the opinion of the Court, the plate was not similar ". . . to the big plates used by the Bureau of Engraving in Washington, D.C." (Tr. 254).

Defendant asserts that this Court must nonetheless consider the character of the May 5 search because of two facts which Agent Newbrand learned during the course of his search of defendant's person on that date. These are the absence at the time of search of any wallet on defendant's person and defendant's statement that he did not have a wallet (Tr. 24, 25). These facts were not offered at trial.

Defendant claims the search of Thursday, May 5, 1966 was illegal and that this illegality in some manner taints the voluntary delivery by Orville Killingbeck of defendant's wallet and its contents to Agent Newbrand on Saturday, May 7, 1966 (Exs. 2, 3 and

6). This purported taint is alleged to occur by virtue of information independently obtained by Agent Kenney from Mrs. Yackley on Friday, May 6, 1966, to the effect that defendant had displayed his wallet at dinner on the previous evening prior to the search of May 5.

The evidence obtained during the May 5 search was not used against defendant in connection with the charge of which he was convicted. This Court need not consider the character of the May 5 search. Because of the significance which defendant attaches to this search, however, the Government will answer defendant's arguments in support of his Assignment of Error No. 1.

A. The May 5 Search Was Lawful

1. The Search Warrant and Supporting Affidavit Show Probable Cause.

The District Court found there was probable cause for the issuance of a search warrant on May 5, 1966 by Commissioner Louis Stern (R. 34).

The relevant inquiry in determining the existence of probable cause to support the issuance of a search warrant is whether there is a substantial basis for the Commissioner to conclude that a crime is being committed—here the unlawful possession of counter-

feit securities of the United States. See *Jones v. U.S.*, 362 U.S. 257, 271 (1960); *Rugendorf v. U.S.*, 376 U.S. 528, 533 (1964). Whether or not a "substantial basis" was present is a question of fact as to which the Commissioner's determination, supported by the presumption of regularity attaching thereto, will ordinarily be accepted. *Irby v. U.S.*, 314 F.2d 251, 253 (C.A.D.C., 1963); cert. den. 374 U.S. 842 (1963) The burden is on the movant to show that the issuance of the warrant was an abuse of discretion. *Irby v. U.S.*, supra, at 258. Where the issue of probable cause is determined by a Commissioner, rather than a police officer, a reviewing court will accept evidence of a less judicially competent or persuasive character than would have justified an officer acting in his own without a warrant. *Jones v. U.S.*, 362 U.S. 257, 270 (1960); *Aguilar v. Texas*, 378 U.S. 108 (1964). Probable cause is the same thing as reasonable grounds. *Stacey v. Emery*, 97 U.S. 642 (1878); see also *Locke v U.S.* 7 Cranch 339, 348 (11 U.S., 1813, Marshall, C.J.) describing probable cause as "suspicion".

The existence of probable cause may be shown in any one of three ways: (1) direct observation by the affiant; (2) hearsay statements ". . . so long as a substantial basis for crediting the hearsay is presented." *Jones v. U.S.*, 362 U.S. 257, 269 (1960); or (3) a combination of both. See *Walker v. U.S.*,

327 F.2d 597 (C.A.D.C., 1963), cert. den. 377 U.S. 956 (1964)

Agent Kenney's statement attached to his affidavit for search warrant (Def. Ex. 4) sets forth information obtained by his direct observation and of his personal knowledge sufficient to establish probable cause. Agent Kenney recites his receipt of the \$20 counterfeit note (Ex. 1) having the notation "8M5106" from a branch of the United States National Bank. He further recites the assignment of that number as a license number to defendant for a 1955 Dodge sedan at an address of Box 214, Clackamas, Oregon. The Government respectfully submits this information alone would constitute probable cause (see Tr. 60). Agent Kenney knew that Tom Mishler, Dunham's associate, had been convicted of counterfeiting in 1956. *U.S. v. Mishler*, Criminal No. 18181, USDC Oregon, 1956. This is a matter of public record. As such, Agent Kenney's statement regarding Mishler's offense may reasonably be read as asserting knowledge gained from such sources. *Smith v. U.S.*, 321 F.2d 427 (C.A. 9, 1963). *Smith* also held that if such allegations ". . . are construed as not referring to any personal knowledge of the affiant, the documentary nature of the facts about which the affiant was informed constitutes the requisite substantial basis for crediting the information under *Jones* and assures the essential

independent determination by the magistrate of the probability that a law was violated on the premises the search of which was requested." *Smith v. U.S.*, 321 F.2d 427, 430 (C.A. 9, 1963). Agent Kenny's statement also contains information of his personal knowledge of defendant's purchase of a trailer from a local finance company, its location and defendant's residence and employment.

Durham's attempted purchase of the particular kind of paper used in printing the "2501" notes and his actual purchase of Agawam bond paper in San Francisco on July 19, 1965, was reported to Agent Kenney by agents of the Secret Service in San Francisco. Durham's close relationship with Tom Mishler was reported to Kenney by Agent Jack Blue, of the Alcohol and Tobacco Tax Division, United States Treasury (Tr. 114-117, see Appellant's brief, p. 29). Information communicated in the course of official business between agents of an investigative bureau is not to be excluded by the hearsay rule. *Chin Kay v. U.S.*, 311 F.2d 317, 320 (C.A. 9, 1963); *Weise v. U.S.*, 251 F.2d 867, 868 (C.A. 9, 1958); cert. den. 357 U.S. 936 (1958); see also *U.S. v. McCormick*, 309 F.2d 367 (C.A. 7, 1962); *U.S. v. Bianco*, 189 F.2d 716, 719 (C.A. 3, 1951). "Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of

their number." *U.S. v. Ventresca*, 380 U.S. 102, 111 (1964). The government respectfully submits that a showing of personal knowledge of Agent Kenney and the extent of such knowledge is manifest from a reading of his statement attached to the affidavit.

The facts set forth in Agent Kenney's statement give additional creditability to the report of the confidential informant and serve as a substantial basis for crediting the information furnished by that informant. See *Draper v. U.S.*, 358 U.S. 307, 313 (1958); *Rugendorf v. U.S.*, 376 U.S. 528, 533 (1964); *Travis v. U.S.*, 362 F.2d 477, 480 (C.A. 9, 1966). The search warrant itself (Def. Ex. 5) refers to a single confidential informant. Agent Kenney's confusion under trying personal circumstances (Tr. 2) between the confidential inquiry or investigation referred to in paragraph 4 of his statement and the confidential informant referred to in paragraph 5 was later corrected (Tr. 114). Kenney's report regarding the investigation of Jack Blue is set out at pages 29 and 30 of Appellant's opening brief. Contrary to appellant's claim (See Appellant's brief, p. 30), this report indicates defendant's presence and assistance to Tom Mishler in Mishler's printing business.

Even though certain portions of an affidavit for a search warrant contain material that is not admissible as a basis for the issuance of a warrant,

this will not invalidate a warrant if the affidavit contains other essential allegations sufficient to establish probable cause. *Chin Kay v. U.S.*, 311 F.2d 317, 321 (C.A. 9, 1963). Thus, even if the recital of the confidential informant's accusations set forth in paragraph 5 of Agent Kenney's statement is not admissible as a basis upon which to consider the sufficiency of the affidavit, which is not for a moment admitted, the other information contained in the affidavit is more than sufficient to warrant a man of reasonable caution in the belief that an offense has been committed and that probable cause exists for the issuance of a warrant. *Carroll v. U.S.*, 267 U.S. 132 (1924); *Brinegar v. U.S.*, 338 U.S. 160 (1948).

In the instant case, officers prudently and with due regard for the rights of defendant obtained a search warrant, and served it upon him prior to commencing their search. Where, as here, the circumstances for obtaining the warrant are detailed and constitute reasons for crediting the source of additional information from a confidential informant and where the magistrate has found probable cause, the Court should not invalidate a warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner. See *U.S. v. Ventresca*, 380 U.S. 102, 109 (1964). There was probable cause for issuance of a warrant.

2. The Search Warrant Sufficiently Describes the Property to be Seized.

The search warrant (Def. Ex. 5) describes the property to be seized as "certain \$20 counterfeit Federal Reserve Notes and other counterfeiting paraphernalia which are alleged by the affidavit of Frank J. Kenney, Special Agent in Charge of the Secret Service, to be at said premises." Literal identity is not required. See *U.S. v. Fitzmaurice*, 45 F.2d 133 (C.C.A. 1, 1930). The description of counterfeit notes and counterfeit paraphernalia need not be so precise as that required in other instances, e.g. stolen goods. See *Nuckols v. U.S.*, 99 F.2d 353 (C.C.A.D.C. 1938), cert. den. 305 US 626 (1935) See also *US. v. Joseph*, 174 F.Supp. 539 (D.C.Pa., 1959), affirmed 278 F2d 504 (C.A. 3, 1960), cert. den. 364 U.S. 832 (1960).

The description in the search warrant is further supplemented by the statement of Frank J. Kenney attached to the affidavit for search warrant (Def. Ex. 4). This statement describes the \$20 counterfeit Federal Reserve Note with further specificity. See *U.S. v. Howell*, 240 F.2d 149 (C.A. 3, 1956).

The Government respectfully submits the description is sufficient. The District Court so held (R. 33). See *Steele v. U.S.*, 267 U.S. 498, 503-504 (1925) "Cases of whiskey", held sufficiently specific; *U.S. v. Ed-*

wards, 296 Fed. 512, 515 (D.C.Mich., 1924) "Whiskey and certain other intoxicating liquors, the exact kind and quantity being at the time to affiant unknown", held sufficient; *U.S. v. Joseph*, 174 F. Supp. 539, 544 D.C.(Pa., 1959) "Betting slips, run-down sheets, records and other paraphernalia and equipment which were being used or intended for use" held sufficient; see also *Calo v. U.S.*, 338 F.2d 793 (C.A. 1, 1964).

3. The Property Seized Was Described in the Search Warrant.

Defendant objects that the description of the property to be seized under the search warrant, namely, "certain \$20 counterfeit Federal Reserve Notes and other counterfeiting paraphernalia" does not encompass the items of property listed upon the return. The District Court held to the contrary (R. 34). Each item seized and offered at trial was capable of use in counterfeiting (Tr. 160, 161, 189-199) and constituted either contraband or an instrumentality of the crime charged. Those items not offered at trial had similar characteristics. All items seized are encompassed within the term "counterfeiting paraphernalia."

Assuming, *arguendo*, that some items seized are neither contraband instrumentalities, nor fruit of the crime, their seizure may nonetheless be proper

if they bear a reasonable relation to the search. *Johnson v. U.S.*, 293 F.2d 539 (C.A.D.C., 1961); *Woo Lai Chun v. U.S.*, 274 F.2d 708 (CA 9, 1960); *Bryant v U.S.*, 252 F.2d 746 (C.A. 5, 1958); *U.S. v. Joseph*, 174 F. Supp. 539, 545 (D.C. Pa., 1959), affirmed 278 F.2d 504 (C.A. 3, 1960), cert. den. 364 U.S. 828 (1960); *U.S. v. Donovan*, 251 F. Supp. 477 (D.C.S.D. Ohio W.D, 1966) Seizure of such items may also be proper as "mere evidence" obtained incident to a lawful arrest See *Warden, Maryland Penitentiary v. Hayden*, ——— U.S. ——— (May 29, 1967). Finally, seizure of property not described in a warrant will not invalidate or require suppression of seized property which is described in the warrant. The remedy is suppression of those items not described. The validity of the warrant is judged not on the basis of what may be found in the future. *U.S. v. Malugin*, 200 F. Supp. 764, 766 (D.C.M.D. Tenn., 1961); *U.S. v. Doe*, 19 F.R.D. 1, 4 (D.C.E.D. Tenn, 1956)

4. Defendant Received a Sufficient Receipt.

Defendant objects that the search of May 5, 1966 was illegally executed. Defendant claims he was not given a sufficient receipt for the property seized. The District Court found to the contrary (R. 34). At the time of the search defendant received a copy of the search warrant (Def. Ex. 1, Tr. 20-21). Defendant also received a receipt for contraband (Def.

Ex. 2, Tr. 22-23). The receipt for contraband was given to Durham by Agent Newbrand following Durham's loss of his copy of the search warrant (Tr. 46). During the hearing on defendant's motion to suppress on July 11, 1966, defendant stipulated that he had then received a copy of the return of the search warrant as filed (Tr. 73, Def. Ex. 5). The copy of return and receipt (Def. Exs. 1 and 2) are not identical with the return as filed with the Court (Def. Ex. 5). They show, however, a substantial compliance. Under the circumstances, the Government respectfully submits they are sufficient. Since the act of leaving a receipt is ministerial, the failure to leave a receipt or a sufficient receipt would not render the search invalid. *McGuire v. U.S.*, 273 U.S. 95, 97 (1927); *Giacolone v. U.S.*, 13 F.2d 108, 109 (C.C.A. 9, 1926); and cases cited in *U.S. v. Gross*, 137 F Supp. 244, 248 (D.C.S.D.NY, 1956, note 11) Defendant's later receipt of a copy of the return as filed would cure any possible defect (Tr. 73).

5. A Reasonable Search Incident to Arrest.

The search of defendant's person on May 5, 1966 meets standards recently applied for momentary detention and interrogation by police officers under suspicious circumstances prior to arrest. *Cotton v. U.S.*, 371 F.2d 385, 392 (C.A. 9, 1967); *Gilbert v. U.S.*, 366 F.2d 923, 928 (C.A. 9, 1966); *Wilson v.*

Porter, 361 F.2d 412 (C.A. 9, 1966); *Lipton v. U.S.*, 348 F.2d 591 (C.A. 9, 1965).

Defendant presented Agent Newbrand with a set of highly suspicious circumstances. Agent Newbrand was acquainted with the information contained in the statement of Agent Kenney (Def. Ex. 4) prior to the search of defendant's person. Defendant's action in immediately going into the barn to do a routine "chore" after Newbrand's identification of himself as an agent of the Secret Service, followed by a hasty departure from a point in the barn where his wallet was found the next morning, could only be considered as unusual (Tr. 16-20, 23-25, 41-43). His additional statements inquiring if he could not make a deal with Agent Newbrand and that he was not responsible for anything found in his trailer could only heighten suspicion. Agent Prouty's discovery of counterfeit currency in defendant's trailer completed an extremely suspicious pattern and constituted probable cause for defendant's arrest. A search of defendant's person at this point was not an unreasonable search within the requirements of the Fourth Amendment. The search of defendant's person on May 5, 1966 was lawful, even in the absence of a search warrant.

- B. ORVILLE KILLINGBECK'S VOLUNTARY DELIVERY OF DEFENDANT'S WALLET AND ITS CONTENTS ON MAY 7, 1966, WAS THE RESULT OF SEVERAL INDEPENDENT SOURCES OF INFORMATION. IT WAS TOO FAR REMOVED FROM THE SEARCH OF MAY 5. THIS EVIDENCE WAS NOT A NECESSARY PRODUCT OF THE MAY 5 SEARCH. ITS ADMISSION WAS PROPER.

Defendant's wallet and contents including two "2501" counterfeit \$20 Federal Reserve Notes were admitted in evidence at trial (Tr. 187). Defendant assigns this as error (Assignment of Error No. 2).

During the May 5 search, defendant, although without his wallet, did not direct or otherwise suggest to Agent Newbrand where it might be. He said, "I don't have one." (Tr. 24-25). Defendant gave no direction as was done in *Wong Sun v. U.S.*, 371 U.S. 471 (1962). Defendant presented the Secret Service with a blank wall. Assuming, *arguendo*, that this search of May 5 was in some manner illegal, Appellant cites no case in which such an absence of evidence or direction has resulted in suppression of evidence subsequently found. The reason may be as follows:

Negative information fails to provide a direction for further investigation. If progress is to be made, other independent sources of information must be found. This was so in the instant case. Agent Kenney's investigation at the Mishler home on May 6,

including his conversation with Mishler's daughter, Mrs. Yackley, was based upon sources of information independent of the May 5 search, e.g., defendant's close association with Mishler in Mishler's printing business at Clackamas, Oregon (Tr. 7, 70-71), Mishler's prior record of counterfeiting (Tr. 70-71), and investigation by Jack Blue (Tr. 27, see Appellant's Brief, p. 29). These independent sources and others set forth in Agent Kenney's affidavit for search warrant (Def. Ex. 4) existed prior to May 5, 1966.

On May 6, Mishler's daughter, Mrs. Yackley, volunteered the information that on the prior day at dinner defendant had displayed a wallet and currency. This information cannot be said to be derived in any way from the search of May 5. Mrs. Yackley's Statement was an additional independent source which, together with others, resulted in Agent Newbrand's return to the Killingbeck farm on May 7 and his inquiry of Orville Killingbeck as to whether he had found defendant's wallet (Tr. 53). Defendant's reliance upon Mrs. Yackley's statement emphasizes its character as an independent source (see Appellant's Brief, p. 42).

There is nothing in the record to suggest that these independent sources did not result in the later discovery of defendant's wallet. See *Cotton v. U.S.*,

371 F.2d 385, 394 (C.A. 9, 1967). On the contrary, the record indicates these independent sources did in fact result in this discovery (Tr. 70-71). To suppress the wallet and its contents as the fruit of a poisonous tree would in effect immunize defendant from the use against him of all subsequently obtained evidence concerning the wallet and its contents no matter how properly obtained from independent sources. See *U.S. v. Avila*, 227 F. Supp. 3, 8 (D.C.N.D. Cal. SD, 1963). The "independent source" referred to in *Silverthorn Lumber Co v. U.S.*, 251 U.S. 385 (1919) is present in the instant case.

The attenuation referred to in *Nardone v. U.S.*, 308 U.S. 338 (1939) and *Wong Sun v. U.S.*, 371 U.S. 471 (1962) is also present. In *Wong Sun*, agents proceeded "immediately" from Toy's home to Yee's house. Two days elapsed in the instant case between Durham's statement that he had no wallet and its later delivery by Orville Killingbeck. This passage of time permitted operation of the numerous independent sources of information.

The District Court did not err in refusing to exclude defendant's wallet and its contents obtained on May 7, 1966, from Orville Killingbeck (Exs. 2, 3, and 6).

II

The District Court Was Correct in Refusing to Strike Exhibit 8.**A. The District Court Did Not Abuse its Discretion in Finding that Defendant's Objection Came Too Late.**

Government Exhibit 8 was offered and admitted without objection, during the afternoon session of October 20, 1966. Before admitting this exhibit, the Court asked defendant's counsel if he had any objection. Defendant's counsel replied, "No, your Honor" (Tr. 188). On the following morning, immediately before argument and instruction of the jury, defendant's counsel for the first time objected to Exhibit 8 and moved to exclude it (Tr. 248-250). The District Court denied defendant's motion on the ground, among others, that it came too late (Tr. 250-251). This ruling is assigned as error (Assignment of Error No. 3).

A general and salutary rule is that objection to the admissibility of evidence should be made at the time it is offered. *Fuller v. U.S.*, 288 F. 442, 445 (C.C.A.D.C., 1923); *Scott v U.S*, 317 F2d 908 (C.A.D.C., 1963). Failure to make timely and proper objection to the admission of evidence constitutes a waiver of the right to object and ordinarily cures any defect or error in its admission. *Sandoval v.*

U.S., 285 F.2d 605, 606 (C.A. 10, 1960); *Moreland v. U.S.*, 270 F.2d 887, 890 (C.A. 10, 1959).

It is within the discretion of the trial judge to sustain or overrule an objection by a defendant delayed until the end of the Government's case. The scope of such discretion becomes broader when objection is delayed until the end of trial and then seeks to strike from the jury's consideration evidence previously received without objection. *Lambert v. U.S.*, 26 F.2d 773, 774 (C.C.A. 9, 1928); *Metcalf v. U.S.*, 195 F.2d 213, 216 (C.A. 6, 1952).

Defendant's counsel made no objection to Exhibit 8 at the time various witnesses identified Government Exhibit 8. On the contrary, defendant's counsel cross examined such witnesses (Tr. 123, 125, 127). Counsel should not be permitted to sit idly by where witnesses testify to certain evidence and then finding it not to his liking, move to strike it. Counsel should also not be permitted to make an affirmative representation that he has no objection to certain evidence and then finding it not to his liking, move to strike it. See *U.S. v. Parnes, et al.*, 210 F.2d 141, 143 (C.A. 2, 1934); *Isaacs v. U.S.*, 301 F.2d 706, 734 (CA 8, 1962) Appellant does not contend that the admission of Exhibit 8 constitutes plain error affecting substantial rights within the meaning of Rule 52(b) F.R.Crim.P. Such a contention would not have merit for the reason that no such error occurred.

B. Exhibit 8 Was Properly Admitted.

Exhibit 8 was similar to counterfeit notes found in defendant's wallet (Exs. 2 and 3) and his trailer (Ex. 5). Exhibit 8 was the first of a series of similar notes received by the Secret Service at the rate of about \$200 per month from July 12, 1965 to the date of defendant's arrest, May 5, 1966. After defendant's arrest, receipt of these notes diminished (Tr. 121).

Intent may be proved by circumstantial evidence. It rarely can be established by other means (Tr. 266). One such circumstance was the passing of a large number of similar counterfeit notes prior to defendant's arrest followed by a decrease in the circulation of such notes after his arrest. From such evidence a jury might reasonably infer that defendant was connected with the passing of such notes, and that because of this connection he had an intent to sell or otherwise use the notes found in his wallet (Exs. 2 and 3) and in his trailer (Ex. 5). Exhibit 8, as one of these notes, was thus relevant and material to proof of an element of each offense charged.

Defendant has never objected to Agent Kenney's evidence of a decrease in the circulation of such notes following defendant's arrest. Defendant should then have no complaint when one of such notes is

received in evidence. Particularly so when Exhibit 8 was the first of this series.

Exhibit 8 and the testimony surrounding it prompted the Secret Service to act. It was this event which caused agents of the Secret Service to commence an investigation and to direct their attention toward defendant. It is similar to any police officer's narrative of the events which initially attracted his attention and brought him to the scene of the crime—in this case the later search of defendant's trailer and person on May 5, 1966 and delivery of his wallet and its contents on May 7, 1966. As such it was relevant and material. See *Lipton v. U.S.*, 348 F.2d 591, 592 (C.A. 9, 1965); *Wilson v. Porter*, 361 F.2d 412, 414 (C.A. 9, 1966); *Rogers v. U.S.*, 362 F.2d 348, 360 (C.A. 8, 1966); *U.S. v. Berry*, 369 F.2d 386, 387 (C.A. 3, 1966); *Jefferson v. U.S.*, 349 F.2d 714, 715 (C.A.D.C., 1965).

The old rule that an inference may not be based upon an inference has been repudiated. *DeVore, et al. v. U.S.*, 368 F.2d 396, 399 (C.A. 9, 1966); *Toliver v. U.S.*, 224 F.2d 742, 745 (C.A. 9, 1955) Rather, the question is merely whether the total evidence, including reasonable inferences, when put together is sufficient to warrant a jury to conclude that defendant is guilty beyond a reasonable doubt. *Dirring v. U.S.*, 328 F.2d 512, 515 (C.A. 1, 1964).

In the instant case Exhibit 8, when viewed as part of the totality of the facts, is part of the fabric of events which shed light on the issues involved by affording grounds for reasonable inferences by the jury. See *Stauffer v. McCrory Stores Corp.*, 155 F. Supp. 710 (D.C. W.D.Pa., 1957).

Many times it is difficult to determine the logical relevance of a particular piece of evidence. The difference between abstract logical relevance and legal relevance cannot always be set out in clear cut terms. *U.S. v. Costello*, 221 F.2d 668, 677 (C.A. 2, 1955), affirmed 350 U.S. 359 (1956). In such situations, the law invests the trial Court with wide latitude of action. A trial court's determination of legal relevancy must be considered an act of discretion not to be disturbed absent a clear showing of abuse. See *Cotton v. U.S.*, 361 F.2d 673, 676 (C.A. 8, 1966). In the instant case, Exhibit 8 was the fact which started an investigation which led to search of defendant's trailer. Exhibit 8 alerted Government agents to the presence of a new "2501" type note of which numerous examples were received in Oregon prior to the seizure of similar notes in defendant's trailer on May 5, 1966. The decrease in circulation of such notes following defendant's arrest and the discovery of similar notes in his wallet on May 7, 1966 are part of the warp and woof of the crimes charged in the Indictment.

Defendant does not claim that the admission of Exhibit 8 constitutes plain error within the ambit of Rule 52(b) F.R. Crim. P. Such a claim would not be appropriate, because no substantial rights of defendant were affected. Defendant's counsel apparently did not think so at the time the evidence was offered when he stated he had no objection. See *Reid v. U.S.*, 334 F.2d 915, 918 (C.A. 9, 1965).

The evidence of defendant's guilt was overwhelming. The jury could only have concluded he was guilty. See *Bushaw v. U.S.*, 353 F.2d 477, 481 (C.A. 9, 1965). The admission of Exhibit 8 was proper.

III

THE DISTRICT COURT WAS CORRECT IN REFUSING TO REQUIRE DISCLOSURE OF THE IDENTITY OF THE CONFIDENTIAL INFORMANT.

Two days prior to trial defendant moved to require disclosure of the name of the confidential informant. It was an afterthought. Defendant's counsel asked for the informant's name several months before during the June 29, 1966 hearing on defendant's motion to suppress (Tr. 9). He did not pursue the inquiry.

Defendant's motion was heard on October 19, 1966, the day preceding trial. Defendant sought the names of two confidential informants. There was only one (Tr. 114). Agent Kenney's inclusion of the confidential inquiry of Agent Jack Blue as a confidential source has already been discussed. The Government respectfully declined to volunteer the name of the confidential informant for fear of physical harm to him (Tr. 9, 77, 79, 115, 252). On the morning of trial, October 20, 1966, the Court denied defendant's motion. The Court advised defendant that it had interrogated the confidential informant and concluded that the informant could give no information helpful to the defendant and that the Government should not be required to reveal his name ". . . because of the danger to him that may result if his name is identified and becomes known" (Tr. 115). (See

sealed exhibit). This ruling is assigned as error (Assignment of Error No. 6).

The informer's privilege was early recognized in *In re Quarles and Butler*, 158 U.S. 532, 535-536 (1894). *Rovario v. U.S.*, 353 U.S. 53, 60-61 (1956) created an exception where the name of the informer is relevant and helpful to the defense or is essential to a determination of the cause. The facts of *Rovario* limit this exception to cases in which the informer helped to set up the commission of the crime and was present at its occurrence. See *Jones v. U.S.*, 271 F.2d 494, 496 fn. 3 (C.A.D.C., 1959), cert. den 362 US. 918 (1959); *U.S. v Rugendorf*, 316 F.2d 589, 592 (C.A. 7, 1963), affirmed 376 U.S. 528 (1963).

There is no absolute rule requiring disclosure of an informer's identity. *McCray v. Illinois*, 386 U.S. 300, 311, 312 (1967). Defendant had a full pre-trial opportunity to examine Agent Kenney regarding the informant (Tr. 9). He did not pursue it. On the eve of trial defendant moved, without supporting affidavits or citation of authority, to require disclosure of the name of the informant (R. 37). Defendant stated in his motion that such disclosure was ". . . essential to a fair determination of the cause at trial and defendant cannot adequately defend himself at trial on the merits without this information" (R. 37). Without more the District Court might

properly have denied Defendant's motion. Instead, the District Court interrogated the informant. (See sealed exhibit). The Court concluded that the informant could give no information helpful to defendant (Tr. 115).

Defendant's statements do not bring the instant case within the exception of *Rovario*. (See R. 37 and Appellant's opening brief, p. 53). There is nowhere even a suggestion that the informant helped to set up the commission of the crime and was present at its occurrence. This Court is respectfully referred to the sealed exhibit for the facts. In attempting to bring the fact of the instant case within the *Rovario* exception, defendant follows a procedure employed unsuccessfully in *Rugendorf v. U.S.*, 376 U.S. 528, 534 (1963).

The importance of informers has been recently recognized. *Lewis v. U.S.*, 385 U.S. 206 (1966). So has their protection. *McCray v. Illinois*, 386 U.S. 300 (1967). On the record which defendant presents to this Court, he asks for a rule virtually prohibiting the use of informers. The District Court did not err in refusing to require the Government to disclose the identity of the confidential informant.

IV

THE DISTRICT COURT WAS CORRECT IN DENYING DEFENDANT'S MOTIONS FOR JUDGEMENT OF ACQUITTAL AT THE CLOSE OF THE GOVERNMENT'S CASE, AT THE CLOSE OF ALL EVIDENCE, AND IN THE ALTERNATIVE FOR A NEW TRIAL, AFTER THE JURY'S VERDICT.

Defendant assigns as error the District Court's denial of his Motions for judgement of acquittal at the close of the Government's case (Assignment of Error No. 4), at the close of all the evidence (Assignment of Error 5), and for acquittal and in the alternative for a new trial after the jury's verdict (Assignment of Error No. 7).

Defendant argues there is insufficient evidence to support these rulings. In judging the sufficiency of the evidence, all conflicts are to be resolved against defendant and the evidence, including reasonable inferences therefrom, and viewed in the light most favorable to the Government. *Glasser v. U.S.*, 315 U.S. 60, 80 (1941).

Defendant complains that the Government presented insufficient evidence that defendant had counterfeit notes in his possession with intent to sell or use them. The Government's evidence showed that defendant's wallet was found the morning after his arrest, that it remained in the same condition as found until delivered to Agent Newbrand, and at the time of this delivery it contained two \$20

counterfeit notes of the type described in the Indictment (Exs. 2 and 3). (Tr. 146-151, 185-187). The Government's evidence also showed that the wallet was found by Orville Killingbeck on Friday morning, May 6, at a dimly lighted point in his barn where defendant had led Agent Newbrand on the previous evening (Tr. 181-182). Defendant's entrance into the barn immediately followed by Agent Newbrand's introduction of himself as a Secret Service Agent, coupled with defendant's hasty departure from a point in the barn where his wallet was found the next morning, would have permitted the Court and jury to infer defendant's trip to the barn was a pretext to dispose of his wallet which he knew contained counterfeit money which he had intended to use. This evidence is further supported by that of defendant's trip to San Francisco, his request there for a type of paper used in printing the counterfeit notes (Exs. 2 and 3), and his purchase of six reams of similar paper for a friend who was to use it for an unusual purpose. Such paper is readily available in Portland. Finally, there is the additional fact that following defendant's arrest the number of counterfeit notes in circulation of the type found in defendant's wallet diminished (Tr. 121). There was additional evidence of defendant's artistic and photographic ability, together with his close association with a known counterfeiter who possessed printing equipment.

Defendant complains there is no evidence that the \$20 counterfeit notes (Exs. 2 and 3) were in his wallet when last seen on his person at Mrs. Yackley's on the evening of his arrest. Such evidence is not required. There is substantial evidence supporting the various rulings of the Court prior to and following the jury's verdict.

CONCLUSION

Defendant had a fair trial. There was substantial evidence to support the Court's rulings which are assigned as error and the jury's verdict of guilty upon Count II of the Indictment. Defendant's assignments of error are not well taken. The District Court's judgment based upon the jury's verdict of guilty upon Count II should be affirmed.

Respectfully submitted,

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Of Attorneys for Appellee*

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Date 24th day of July, 1967

JACK G. COLLINS

First Assistant United States Attorney

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Commissioner's Docket No. CH6-105

UNITED STATES OF AMERICA

v.

SEARCH WARRANT

GEORGE W. DURHAM,
Defendant.

To United States Marshal or any authorized officer.

Affidavit having been made before me by Frank J. Kenney, Special Agent in Charge of Secret Service that he has reason to believe that on the person of George W. Durham and on the premises known as Orville Fredrick Killingbeck Chicken Farm, 7911 S.E. Thiessen Road, Milwaukie, Oregon, and more particularly in a 1959 Traveler trailer, white color, and in a 1955 Dodge Sedan, Oregon License 8M-5106 located at said premises in the District of Oregon there is now being concealed certain property, namely, certain twenty dollar counterfeit federal reserve notes and other counterfeiting paraphernalia which are alleged by the Affidavit of Frank J. Kenney, Special Agent in Charge of Secret Service, to be at said premises based upon the personal knowledge of Mr. Kenney uncovered in an official investigation and also information received from a confidential informant, and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person and premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the person and place named for the property specified,

serving this warrant and making the search in the daytime and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 5th day of May, 1966

-s- Louis Stern,
LOUIS STERN
U.S. Commissioner.

RETURN

I received the attached search warrant May 5, 1966 and have executed it as follows:

On May 5, 1966 at 7:59 o'clock p.m., I searched (the person) described in the warrant and (the premises)

I left a copy of the warrant with George W. Durham together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

Approximately 16 packages of Cft. Notes in a 1 gallon jar; also an unknown number of photographic negatives of United States Currency.

- 1 (one) gallon jar containing miscellaneous articles used in the manufacture of counterfeit currency.
- 1 (one) Photoscope-projector, model B.
- 1 (one) Davidson Star D tripod
- 1 (one) box 3M photo offset plates.
- 1 (one) Seneca Camera.
- 2 (two) General Electric Arc Lamps.
- 1 (one) can of offset Hemlock Green ink.
- 2 (two) Twelve ounce jars of Butternut Coffee.
- 1 (one) Ten ounce jar of Chase & Sanborn Coffee.
- 1 (one) jar of Craftint negative opaque.
- 1 (one) Cal Ink .066 gague blanket.
- 4 (four) cut film holders.
- 1 Camera Manufactured by Rochester Optical Company with accessories.
- 1 (one) Selsi Magnifying Glass.
- 1 (one) package of Kodak Chromium intensifier.
- 2 (two) packages of Anesco Copper intensifier.
- 1 (one) book 11 x 14 of unused paper.
- 1 (one) twelve inch ruler.

This inventory was made in the presence of Frank J. Kenney, Dennis L. Prouty, and Michael A. Endicott and

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

-s- Frank J. Kenney

Subscribed and sworn to and returned before me this 11 day of May, 1966.

-s- Louis Stern

United States Commissioner.

- 1 (one) bank bag containing 92 pennies.
- 1 (one) billfold ("empty").
- 4 (four) personal address books.
- 2 (two) six foot extension cords.
- 1 (one) key ring with six keys.
- assorted "pulp" magazines.
- 1 (one) piece of 11 x 18 glass and frame.
- 1 (one) piece of copper plating.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA

v.

GEORGE W. DURHAM,

Defendant.

AFFIDAVIT FOR
SEARCH WARRANT

BEFORE LOUIS STERN, Portland, Oregon

The undersigned being duly sworn deposes and says:

That he has reason to believe that on the person of George W. Durham and) on the premises known as Orville Fredrick Killingbeck Chicken Farm, 7911 S.E. Thiessen Road, Milwaukie, Oregon, and more particularly in a 1959 Traveler trailer, white color, and in a 1955 Dodge Sedan, Oregon License 8M-5106 located at said premises in the District of Oregon, there is now being concealed certain property, namely certain twenty dollar counterfeit federal reserve notes and other counterfeiting paraphernalia which are (See attached sheet)

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: (See attached sheet)

-s- Frank J. Kenney,
FRANK J. KENNEY
Special Agent in Charge of Secret Service

Sworn to before me, and subscribed in my presence, May 5, 1966

-s- Louis Stern
LOUIS STERN
United States Commissioner

STATEMENT BY FRANK J. KENNEY, SPECIAL AGENT IN CHARGE OF SECRET SERVICE

On July 12, 1965, a new issue \$20 counterfeit note on the Federal Reserve Bank of San Francisco, Series 1950D, Serial Number L54406434C, Check Letter "J", Face Plate Number 254, Back Plate 830, as received by the Metropolitan Branch, U.S. National Bank of Oregon, Portland, Oregon, as part of a deposit to the account of the Oregon State Liquor Commission Store, Store No. 30, Portland, Oregon. On examination of this note, on the back on the border of the left lower corner was an inked notation "8 M 5106", which conforms with the Oregon State Motor Vehicle licensing schedule.

The Oregon State Motor Vehicle Department, Salem, Oregon, records reflect that this license number is assigned to George W. Durham, Box 214, Clackamas, Oregon, for a 1955 Dodge sedan.

On July 19, 1965, George W. Durham appeared at the Commercial Paper Co., 300 Brannan, San Francisco, and attempted to make a purchase of 100 per cent Anniversary Bond paper, which has been identified as the type of paper used in the printing of the counterfeit notes. This type bond paper was not available and Durham purchased six reams (8 1-2" x 11") of Agawan bond. At the time of purchase Durham informed the paper company employee that he was making the purchase for a man in Clackamas, Oregon, who made auto glass patterns and needed the paper for a technical manual. Durham at time of sale displayed his Oregon Driver's license and gave his address as Box 246, Willamina, Oregon, which is the post office box of Roy E. Durham, brother of George Durham.

Investigation has developed that George W. Durham during the years 1964 and 1965 was engaged with Archie Leo Mishler aka Tom Mishler in his printing business at Route 1, Box 483, Clackamas, Oregon. Tom Mishler was arrested by the Secret Service on March 20, 1956, for counterfeiting currency and was placed on probation.

Within recent weeks, a confidential informant has furnished the Government information that during 1964 and 1965 George W. Durham and Tom Mishler had printed up some \$20 counterfeit notes.

Durham is residing in a 1959 Traveler trailer, white color, which he is purchasing under contract from Blake and Neal Finance Co., Portland, Oregon. The trailer and vehicle of Durham's is located at Orville Fredrick Killingbeck Chicken Farm, 7911 S.E. Thiesen Road, Milwaukie, Oregon, where Durham is employed.

-s- Frank J. Kenney
FRANK J. KENNEY,
Special Agent in Charge of Secret Service

SIDNEY I. LEZAK
 United States Attorney
 District of Oregon
 JACK G. COLLINS
 First Assistant U.S. Attorney
 506 U.S. Courthouse, Box 71
 Portland, Oregon 97207
 226-3361, Ext. 1531
 Of Attorneys for Plaintiff

**IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF OREGON**

UNITED STATES OF
 AMERICA,

CR 66-133

Plaintiff,

v.

GEORGE
 WASHINGTON
 DURHAM,

Defendant.

**FINDINGS OF FACT AND
 CONCLUSIONS OF LAW
 RESPECTING DEFENDANT'S
 MOTIONS TO SUPPRESS FOR
 RETURN OF SIEZED PROPER-
 TY**

On June 29, defendant's motion to suppress and for return of certain seized property came on for hearing. Defendant was present and represented by his attorney, Mr. Jonathan Newman. The United States was represented by Jack G. Collins, First Assistant U.S. Attorney. The testimony of Special Agents Frank Kenney, Robert J. Newbrand and Dennis Prouty, and the further testimony of O. F. Killingbeck, together with certain documentary evidence as received. The hearing was continued to July 11, 1966 in order that defendant might further examine Special Agent Frank Kenney and on that

date further testimony of Special Agent Kenney was received.

On the basis of the evidence received at the hearing on defendant's motions, as continued, and the records and files herein, the Court makes the following findings of fact and conclusions of law respecting defendant's motions to suppress and for the return of certain seized property.

FINDINGS OF FACT

I

On May 5, 1966, Special Agent Frank J. Kenney of the United States Secret Service appeared before the Honorable Louis Stern, United States Commissioner at Portland, Oregon and gave his affidavit for search warrant (which affidavit included the further written statement of Special Agent Frank J. Kenney attached thereto). This affidavit and accompanying statement is defendant's Exhibit 4. Based upon this affidavit and the attached statement of Agent Kenney, Commissioner Stern, on May 5, 1966, issued a search warrant. Defendant's Exhibit 5 is the original of this warrant and the return upon such warrant later made on May 11, 1966. The property to be seized is set forth in the search warrant as ". . . namely, certain twenty dollar counterfeit Federal Reserve notes and other coun-

terfeiting paraphanelia which are alleged by the affidavit of Frank J. Kenney, Special Agent in charge of Secret Service, to be at said premises . . ." The description of the property to be seized is further supplemented by the affidavit for search warrant and the statement of Frank J. Kenney attached to such affidavit (defendant's Exhibit 4), which sets forth a particular \$20 counterfeit Federal Reserve note, namely a \$20 counterfeit note on the Federal Reserve Bank of San Francisco, Series 1950D, Serial Number L54406434C, Check Letter "J", Face Plate Number 254, Back Plate 830.

II

The statement of Special Agent Kenney attached to the affidavit for search warrant (defendant's Exhibit 4) states in part:

"On July 12, 1965, a new issue \$20 counterfeit note on the Federal Reserve Bank of San Francisco, Series 1950D, Serial Number L544064-34C, Check Letter "J", Face Plate Number 254, Back Plate 830, was received by the Metropolitan Branch, U.S. National Bank of Oregon, Portland, Oregon, as part of a deposit to the account of the Oregon State Liquor Commission Store, Store No. 30, Portland, Oregon. On examination of this note, on the back on the border of the left lower corner was an inked notation "8 M 5106" which conforms with the Oregon State Motor Vehicle licensing schedule.

"The Oregon State Motor Vehicle Department, Salem, Oregon, records reflect that this license

number is assigned to George W. Durham, Box 214, Clackamas, Oregon, for a 1955 Dodge sedan.”

Immediately following notification of the receipt of the aforementioned counterfeit note by the Metropolitan Branch, U.S. National Bank of Oregon, Special Agent Kenney went to the bank, identified the note as counterfeit, and learned at the bank of receipt by the bank of this note from the Oregon State Liquor Commission Store, Store No. 30, Portland, Oregon. The inked notation “8 M 5106” upon the counterfeit note was on the note when received by the bank. Agent Kenney then made inquiry of the Oregon State Motor Vehicle Department concerning the number “8 M 5106” and was advised that the records of the Oregon State Motor Vehicle Department, Salem, Oregon, reflect that this license number is assigned to George W. Durham, Box 214, Clackamas, Oregon for a 1955 Dodge Sedan.

III

The statement of Special Agent Kenney attached to the affidavit for search warrant (defendant's Exhibit 4) further states in part:

“On July 19, 1965, George W. Durham appeared at the Commercial Paper Co., 300 Brannan, San Francisco, and attempted to make a purchase of 100 per cent Anniversary Bond Paper,

which has been identified as the type of paper used in the printing of the counterfeit notes. This type bond paper was not available and Durham purchased six reams (8 1-2" x 11") of Agawam bond. At the time of purchase Durham informed the paper company employee that he was making the purchase for a man in Clackamas, Oregon, who made auto glass patterns and needed the paper for a technical manual. Durham at time of sale displayed his Oregon Driver's license and gave his address as Box 246, Willamina, Oregon, which is the post office box of Roy E. Durham, brother of George Durham.

Special Agent Kenney had received this information from agents of the Secret Service in San Francisco, California prior to the making of his affidavit for search warrant. The Secret Service agents in San Francisco had received such information from Mr. H. Hayes of the Commercial Paper Company, 300 Brannan, San Francisco, California on July 19, 1965, except as to that portion of the above statement referring to the post office box of Roy E. Durham, brother of George Durham. This latter information Agent Kenney obtained upon his own investigation.

IV

Archie Leo Mishler aka Tom Mishler had been arrested by the Secret Service in this district on March 20, 1956 upon a charge of counterfeiting currency and was convicted upon his plea of guilty

and placed upon probation. *U.S. v. Mishler*, Cr. No. 18181, USDC Oregon (1956). Special Agent Kenney possessed such information of his own knowledge prior to and at the time of making his affidavit and the records of this Court so reflect. The remaining information contained in Paragraph 4 of the statement of Frank J. Kenney attached to his affidavit for a search warrant as set forth hereafter was obtained by Special Agent Kenney from an unnamed confidential informant, to wit:

“Investigation has developed that George W. Durham during the years 1964 and 1965 was engaged with Archie Leo Mishler aka Tom Mishler in his printing business at Route 1, Box 483, Clackamas, Oregon.”

V

The statement of Special Agent Kenney attached to the affidavit for search warrant (defendant's Exhibit 4) further states in part:

“Durham is residing in a 1959 Traveler trailer, white color, which he is purchasing under contract from Blake and Neal Finance Co., Portland, Oregon. The trailer and vehicle of Durham's is located at Orville Fredrick Killingbeck Chicken Farm, 7911 S.E. Thiessen Road, Milwaukie, Oregon, where Durham is employed.”

Special Agent Kenney obtained such information from the Blake and Neal Finance Company.

VI

During the course of Special Agent Kenney's investigation, a confidential informant further advised him as set forth in his statement attached to the affidavit for search warrant that,

"Within recent weeks, a confidential informant has furnished the Government information that during 1964 and 1965 George W. Durham and Tom Mishler had printed up some \$20 counterfeit notes."

Said confidential informant is not the same as the confidential informant referred to in Paragraph IV above.

VII

After issuance of the search warrant by Commissioner Stern as aforementioned, and with the search warrant in their possession, Secret Service Agents Robert Newbrand, Dennis Prouty, Endicott, Frank J. Kenney and John Wells, commenced a search of the premises described therein at 7:59 p.m. Pacific Daylight Time on May 5, 1966. Pacific Daylight Time was the time then in effect on May 5, 1966 in this District of Oregon and at the place and premises of the search. At the time of commencement of the search the conditions of daylight were such that a person might easily read a newspaper or recognize a face. Sunset did not occur at

the place of search until 8:22 p.m. Pacific Daylight Time. This search was commenced prior to sunset and during daytime and continued after sunset and during twilight.

VIII

Prior to commencement of the search as aforementioned, Special Agent Robert Newbrand identified himself to defendant Durham. Durham acknowledged to Agent Newbrand that he was defendant George W. Durham. Newbrand advised Durham of the reason for his presence at that time and place. Durham, accompanied by Newbrand, entered a barn upon the premises, Durham stating that he had certain chores to do in the barn. Durham entered a dumb waiter or elevator in the barn and inquired of Newbrand again the reason of his presence. Newbrand stated the reason for his presence and Durham and Newbrand then approached the Traveler trailer on the premises. Durham stated it was his trailer and was locked, then requested and was given a copy of the search warrant, spent several minutes reading the same. Newbrand requested Durham to open the trailer. Durham obtained the key for the trailer from a hook or nail on which the key was hanging inside the door of the Killingbeck farm house and then opened the trailer and stated that the agents might "get on with your search." He further stated that he was not responsible for

anything inside the trailer for the reason that he had been gone for the past 40 hours. Upon entering the trailer, Special Agent Prouty found twenty dollar counterfeit Federal Reserve notes in a one gallon jar located under a trailer seat plus the other items as set forth upon the return upon the search warrant herein, defendant's Exhibit 5. Such items were produced in Court at time of hearing by the government. There was testimony which shows that certain items are the type which may be used in counterfeiting. Prior to the entry of the trailer, defendant George W. Durham was personally searched by Agent Newbrand and no wallet was found upon his person. Newbrand inquired of Durham as to the whereabouts of his wallet and Durham stated he had no wallet.

IX

Before conclusion of the search, Agent Newbrand wrote upon the copy of search warrant previously delivered by Newbrand to Durham as aforementioned, the description of certain of the items seized as set forth thereon. See defendant's Exhibit 1. This copy of warrant together with certain other articles had been placed together shortly after the commencement of search and the copy of a receipt for contraband was at Durham's request delivered to him by Agent Newbrand. The original of this receipt for contraband is defendant's Exhibit 2.

At the conclusion of the search, defendant was placed under arrest by Newbrand upon a charge of possession of counterfeit securities. 18 U.S.C. Sec. 474. Prior to this hearing defendant had received a copy of the original return of the search warrant.

X

On May 6, 1966, Special Agent Kenney went to the home of Archie Leo Mishler, also known as Tom Mishler, Route 1, Box 483, Clackamas, Oregon and there Mishler's daughter, Mrs. Yackley, volunteered the information that on the preceding day, May 5, 1966, defendant Durham was in the Mishler home and had shown her a wallet containing currency.

XI

On May 7, 1966, Kenney informed Newbrand of his conversation with Mrs. Yackley. Agents Newbrand and Prouty then went to the Killingbeck farm. Agent Newbrand identified himself to Orville Frederick Killingbeck whom he had met on the evening of May 5, 1966 in the course of the search and Killingbeck informed the agents that he had found Durham's wallet on the preceding day in the barn. He delivered the wallet and its contents to the agents upon their request in the same condition as when found. At Killingbeck's request Newbrand

gave him a receipt for the wallet and its contents, defendant's Exhibit 3. I find this testimony much more credible than that of Killingbeck as to the circumstances under which the wallet and its contents were delivered. The wallet contained two counterfeit \$20 Federal Reserve notes. The property obtained from Killingbeck on May 7, 1966 was produced by the government at the time of this hearing with the exception of \$38 in genuine currency of the United States which was returned to defendant's attorney on May 31, 1966.

Based upon the foregoing Findings of Fact the Court makes the following

CONCLUSIONS OF LAW

1. The search warrant (defendant's Exhibit 5) describes the property to be seized with sufficient particularity.
2. The property seized on May 5, 1966, which is listed in the return of the search warrant (defendant's Exhibit 5), is properly described.
3. The search warrant was legally and properly executed.
4. There was probable cause for the issuance of the search warrant on May 5, 1966, by Commissioner Louis Stern.

5. The search warrant (defendant's Exhibit 5) and the search pursuant thereto on May 5, 1966 were legally and properly executed and the seizure of the property set forth upon the return to such warrant was legally and properly made.

6. The property obtained by Agents Newbrand and Prouty from O. F. Killingbeck on May 7, 1966, was legally obtained.

7. Defendant is not entitled to an order suppressing evidence and for the return of seized property.

Dated this 5th day of August, 1966.

-s- Gus J. Solomon
JUDGE

PRESENTED BY:

-s- Jack G. Collins

JACK G. COLLINS

First Assistant U.S. Attorney

SIDNEY I. LEZAK

United States Attorney

District of Oregon

JACK G. COLLINS

First Assistant U.S. Attorney

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Portland, Oregon 97207

262-3361, Ext. 1531

Of Attorneys for Plaintiff

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

UNITED STATES OF AMERICA,

Plaintiff,

v.

CR 66-133

GEORGE

WASHINGTON

DURHAM,

Defendant.

ORDER DENYING DEFENDANT'S MOTIONS FOR THE SUPPRESSION OF EVIDENCE AND THE RETURN OF SEIZED PROPERTY

Based upon the Findings of Fact and Conclusions of Law previously entered herein, it is ordered that defendant's motions for the suppression of evidence and the return of seized property of evidence as listed in the return of search warrant (defendant's Exhibit 5) which property was seized by agents of the Secret Service on May 5, 1966 and defendant's further motions for the suppression of evidence and the return of seized property as listed on defend-

ant's Exhibit 3, which property was obtained by agents of the Secret Service on May 7, 1966 from O. F. Killingbeck should be and each of such motions is denied.

Dated: August 5, 1966.

-s- Gus J. Solomon
Judge

PRESENTED BY:

-s- Jack G. Collins
JACK G. COLLINS
First Assistant U.S. Attorney

UNITED STATES OF AMERICA

vs.

GEORGE

NO. CR 66-133

WASHINGTON

INDICTMENT

DURHAM,

Defendant.

(18 U.S.C. § 474)

THE GRAND JURY CHARGES:

COUNT I

(18 U.S.C. § 474)

On or about May 5, 1966, in and at a trailer-house located on the O. F. Killingbeck Farm, 7911 S.E. Thiessen Road, Milwaukie, in the District of Oregon, GEORGE WASHINGTON DURHAM, defendant, did unlawfully, wilfully and knowingly have in his possession and custody, without authority from the Secretary of the Treasury or other proper officer, an obligation and security made and executed after the similitude of an obligation and security issued under the authority of the United States, that is, a purported \$20 Federal Reserve Note on the Federal Reserve Bank of San Francisco, series of 1950 D, check letter J, face plate No. 254, back plate No. 946, serial No. L54406434C, with intent to sell or otherwise use the same; in violation of Section 474, Title 18, United States Code.

COUNT II**(18 U.S.C. § 474)**

During the period May 1 through 7, 1966, in and at a barn located at the O. F. Killingbeck Farm, 7911 S.E. Thiessen Road, Milwaukie, in the District of Oregon, GEORGE WASHINGTON DURHAM, defendant, did unlawfully, wilfully and knowingly have in his possession and custody, without authority from the Secretary of the Treasury or other proper person, an obligation and security made and executed after the similitude of an obligation and security issued under authority of the United States, that is, a purported \$20 Federal Reserve Note on the Federal Reserve Bank of San Francisco, series of 1950 D, check letter J, face plate No. 254, back plate No. 946, serial No. L54406434C, with intent to sell or otherwise use the same, in violation of Section 474, Title 18, United States Code.

COUNT III**(18 U.S.C. § 474)**

On or about May 5, 1966, within the District of Oregon, GEORGE WASHINGTON DURHAM, defendant, did unlawfully, wilfully and knowingly have in his control, custody and possession a plate and thing made after and in the similitude of a plate and thing from which an obligation and security of the United States has been printed, with intent to use

such plate and thing or to suffer the same to be used in forging and counterfeiting an obligation and security of the United States, that is a forged and counterfeited \$5 United States Note, series 1963, check letter H, face plate No. 6, series No. A 15829646A with facsimile signatures of Kathryn O'Hay Granahan, Treasurer of the United States and C. Douglas Dillon, Secretary of the Treasury, in violation of Section 474, Title 18, United States Code.

Dated this 13 day of June, 1966.

-s- Darrell DeBorde
FOREMAN

SIDNEY I. LEZAK
United States Attorney
District of Oregon
-s- Jack G. Collins
JACK G. COLLINS
Assistant United States Attorney

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

Date: 24th day of July 1967.

JACK G. COLLINS

First Assistant United States Attorney

